Table of Authorities Cited

Cases	Pages
U.S. v. Forgione (C.A. Mass. 1973), 487 F.2d 364, cert. den. 94 S.Ct. 1561	5
U.S. v. Murphy (C.A. Mass. 1973), 480 F.2d 256, cert. den. 94 S.Ct. 253	5
U.S. v. Seuss (C.A. Mass. 1973), 474 F.2d 385, 21 A.L.R. Fed. 967, cert. den. 412 U.S. 928, 37 L.Ed.2d 155, 93 S.Ct. 2751	5
U.S. v. Tropeano (C.A. Mass. 1973), 476 F.2d 586, cert. den. 94 S.Ct. 90	5
Zuber v. Allen, 396 U.S. 168, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969)	2

Regulations	
9 C.F.R. 306.5	4
9 C.F.R. 318.9	6

Statutes	
21 U.S.C.:	
Section 606	1, 3
Section 622	5
Section 642(a)	3, 6
Section 695	2, 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

CHIP STEAK CO., INC. and VAO L. CHENEY,
AS PRESIDENT, *Petitioners,*

vs.

EARL A. BUTZ, SECRETARY OF AGRICULTURE, M. E. CHRISTOPHERSON, U.S.D.A. REGIONAL DIRECTOR, R. A. MOODY, U.S.D.A. DEPUTY DIRECTOR, R. E. GOERTZ, U.S.D.A. OFFICER IN CHARGE OF THE SAN FRANCISCO CIRCUIT, LEON G. BROIDY and A. J. ENGLISH, U.S.D.A. MEAT INSPECTORS, *Respondents.*

REPLY TO THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The U.S. Department of Agriculture admits it has no specific statute under the Federal Meat Inspection Act authorizing it to take samples of meat food products without payment (Memo. opp. p. 2). Instead the government relies upon its long-standing interpretation of 21 U.S.C. § 606, which does not even mention the taking of samples of meat food products (Memo. opp. p. 2).

The Supreme Court recently disagreed with another of the Agriculture Department's interpretation of a statute. In doing so, the Court declared:

> "While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially contemporaneous construction, [citations] it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. [Citations] In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation. [Citations.]
>
> "The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress . . ."
>
> *Zuber v. Allen,* 396 U.S. 168, 90 S.Ct. 314, 327-28, 24 L.Ed.2d 345 (1969).

Here the Agriculture Department gives in its memorandum no citations to legislative history showing where the administrators disclosed to Congress their position on taking samples of meat food products without payment. If in fact the administrators ever did so, Congress obviously was unimpressed. After not mentioning the taking of samples in the original Federal Meat Inspection Act of 1907, Congress provided in the 1947 amendment, 21 U.S.C. § 695, that "[t]he cost of inspection rendered on and after July

1, 1948 . . . shall be borne by the United States . . ." (Memo. opp. p. 2). In the 1967 amendment, a major revision of the Meat Inspection Act, Congress specified in 21 U.S.C. § 642(a) that U.S.D.A. inspectors "can take reasonable samples of their (meat processor's) inventory upon payment of the fair market value therefor."

With neither legislative history nor the wording of the law to undergrid their argument, the Agriculture Department claims that the word "inventory" as used in Section 642(a) does not apply to Section 606 inspections made of products, "prior to the time that they have been labeled 'inspected and passed'." This argument simply has no bearing. All meat products concerned in this action which enter the premises of Chip Steak Co. for processing have already been labeled or marked "Inspected and Passed" by a U.S.D.A. inspector at a slaughtering plant under Section 606 (R.T. 36, 42-44).* In addition, the second batch of samples taken by U.S.D.A. inspectors from Chip Steak Co. was both packaged and labeled "Inspected and Passed" (C.R. 79, 113).[1] At the present

*"R.T." refers to the Reporter's Transcript and "C.R." refers to the Court Record filed in the Court of Appeal.

[1]The inspector previously had taken "Inspected and Passed" meat being processed into commutated beef steaks without making payment for them (C.R. 77, 113). It is suspected that these samples had been taken from the line before the product was thoroughly mixed and resulted in alleged high fat content 35.1% fat (C.R. 32). However, the finished and packaged product had a low fat content 27.1-26.9% (C.R. 79, 113, 33). Since the U.S.D.A. inspector did not sample the finished product, the entire lot of the packaged meat product was wrongfully charged as "adulterated and misbranded" and illegally detained by the Agriculture Department for 198 days without cause. As a practical matter the U.S.D.A. should have only sampled the finished and packaged product.

time the Agriculture Department is still taking "inspected and passed" meat products without "payment of the fair market value therefor."

Finally the Agriculture Department argues that the taking of meat samples is not the taking of property without due process of law as long as the quantity is reasonable (Memo. opp. pp. 4-5 and footnotes 1 and 2). However, U.S.D.A. inspector does not have to notify the owner when he takes samples, nor does he leave a receipt.[2] The quantity of samples taken by the inspector is not known to the owner so that the general regulation, 9 C.F.R. 306.5 on the owner's right of appeal, is a mockery.[3]

The taking of meat samples by U.S.D.A. inspectors without payment is a poor administrative practice and is contrary to Congress' general policy (Pet. p. 11):

> ". . . the cost of such inspection should be paid out of the General Fund of the federal government, not only because such inspection is a proper charge against the people as a whole, but because

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[2]The memorandum of decision states at ix and footnote 6 of (Pet. App. B): "The issue of whether the USDA should be required to give receipts for samples taken is not before this court. However, without determining whether there is any such legal requirement, it seems reasonable to expect that the USDA would, at least as a matter of courtesy and good practice, give notice of and receipts for samples taken in the course of inspection." It would seem that something a little more forceful than the court's mere observation is needed.

[3]9 C.F.R. 306.5 Appeals. "Any appeal from a decision of any Program employee shall be made to his immediate supervisor having jurisdiction over the subject matter of the appeal, except as otherwise provided in the applicable rules of practice."

This action was filed in federal Court because the immediate supervisor of the Program employee would not retest the meat product (C.R. 84, R.T. 101-102) nor pay for the samples taken (C.R. 143).

> it is the only way in which the consumer can be assured of effective, uncompromising inspection, in which they can repose the fullest confidence."

The confidence of the consumer and the honest majority of the meat industry have been shaken by recent Court actions involving the bribery of U.S.D.A. inspectors by gifts of monies and meat products from hands of employees of firms whose products were under the Federal Meat Inspection Act. *U.S. v. Forgione* (C.A. Mass. 1973), 487 F.2d 364, certiorari denied 94 S.Ct. 1561; *U.S. v. Murphy* (C.A. Mass. 1973), 480 F.2d 256, certiorari denied 94 S.Ct. 253; *U.S. v. Tropeano* (C.A. Mass. 1973), 476 F.2d 586, certiorari denied 94 S.Ct. 90; *U.S. v. Seuss* (C.A. 1, Mass. 1973), 474 F.2d 385, 21 A.L.R. Fed. 967, certiorari denied 412 U.S. 928, 37 L.Ed.2d 155, 93 S.Ct. 2751. In the *Seuss* opinion, 474 F.2d *388,* the Appellate Court speaking to the bribery provision, 21 U.S.C. § 622, of the Federal Meat Inspection Act stated:

> "First, and most significantly, we think it clear that the statute prohibits the officials authorized to perform the prescribed inspection duties from accepting things of value in connection with or arising out of the performance of their official duties. This common sense interpretation stems first from consideration of the legislative purpose. The Meat Inspection Act of 1907, 34 Stat. 1264, passed in response to the unsanitary conditions in the Meat Packing industry, revealed in Upton Sinclair's expose, 'The Jungle', was designed to insure that meat products sold to the consumer be clean and safe. A system of federal inspection was created and the inspectors subjected to strict

> regulation lest their corruption—or the appearance of it—undermine the quality of meat or the public's trust in their supervision of meat quality."

In order to maintain an uncompromising system of meat inspection as intended by Congress, Courts should assume their responsibility to construe the language employed by Congress to mean what it says: that U.S.D.A. inspectors "can take reasonable samples of their [meat processor's or owner's] inventory upon payment of the fair market value therefor." This Court should remove the illegal administrative loophole created by regulation 9 C.F.R. 318.9, authorizing the taking of property without due process of law and contrary to 21 U.S.C. § 642(a) and § 695, which require payment for samples taken by federal meat inspectors.

For these responding reasons, as well as for the reasons previously stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
February 5, 1975.

GEORGE ALEXANDER MCKRAY,
Attorney for Petitioners.